91-1185
CAUSE NO.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991 TERM

JAMES ALLEN RATCHFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES ALLEN RATCHFORD
P.O. BOX 60696
OKLAHOMA CITY,
OKLAHOMA 73146
(405) 943-0200

Pro Se

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THE QUESTIONS PRESENTED FOR REVIEW EXPRESSED IN THE TERMS AND CIRCUMSTANCES OF THE CASE

(1) Whether a series of prejudicial misstatements of fact and law by the prosecutor during closing arguments constituted prosecutorial misconduct?

(2) Whether these prejudicial misstatements or prosecutorial misconduct constituted plain error?

(3) Whether the prejudicial misstatements or prosecutorial misconduct deprived the Petitioner of life, liberty, or property, without due process of law pursuant to the U.S. Constitution, Amendment V?

LIST OF ALL THE PARTIES TO THE PROCEEDING

Petitioner James Allen Ratchford is the only party seeking review of this judgment. Therefore, the caption of the case contains the names of all parties to the proceeding.

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CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) Date of judgment sought to be reviewed.

The Opinion of which review is sought was filed August 12, 1991.

(ii) Date of any order respecting rehearing.

September 24, 1991.

(iii) Cross Petition.

Not applicable.

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant to 28 U.S.C. Sec. 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

THE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THE CASE INVOLVES

(1) Constitutional Provisions:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
> U.S. Const. Amend V--Criminal Actions--Provisions Concerning--Due Process of Law and Just Compensation Clauses.

(2) Statutes Involved:

> Not applicable.

(3) Rules Involved:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.
> Federal Rules of Criminal Procedure, Rule 52(b)

CONCISE STATEMENT OF THE CASE

Petitioner, James Allen Ratchford, was charged in an eleven-count Indictment filed in the Western District of Oklahoma with nine counts of bank fraud and two counts of misapplication of funds, in violation of 18 U.S.C. Sec. 1344(1) and 657. A trial was held August 15 through 20, 1990, during the closing arguments of which the Assistant U.S. Attorney made numerous misstatements of fact and law to the jury, without objection by Petitioner's trial counsel and without correction or admonishment by the trial judge at the time of misstatement. Mr. Ratchford was convicted of all counts. He filed a timely notice of appeal. On August 12, 1991, the United States Court of Appeals for the Tenth Circuit affirmed the district court's rulings in an opinion marked for publication. United States v. Ratchford, 942 F.2d 702 (10th

Cir. 1991). Mr. Ratchford filed a petition for rehearing and suggestion for rehearing en banc. On September 24, 1991, the petition for rehearing was denied, and the suggestion for rehearing en banc was also denied.

The following facts are material to the consideration of the questions provided and were before the court of appeals when they denied Mr. Ratchford's request to reverse the district court's decision from a finding of guilt, with instructions to either dismiss all counts or remand to the lower court for a new trial:

From 1980 until August, 1987, Mr. Ratchford was the chief operating officer of Home Management, Inc., a holding company for several related businesses all operating in the areas of real estate management and maintenance. The indictment charged that in January 1987,

Mr. Ratchford began kiting checks at three different banks utilizing the accounts of his companies, his personal account, and an account labeled HMI Investors Trust Account; that Mr. Ratchford's activities continued until April 1987, ultimately causing a loss to two of the banks of nearly $50,000. Count one charged defendant with writing a check in the amount of $4,300 on January 21, 1987, count two a check of $4,500 on February 9, 1987, and count three a check of $4,900 on March 20, 1987, and counts 4-9 were for six checks in various amounts written in late April, 1987, while "knowing or having reason to know that the funds in [the respective accounts] were not sufficient to pay such . . . check[s]," in violation of 18 U.S.C. Sec. 1344(1). Indictment, IR. tab 5/9/90, at 3,4.

The indictment also alleged that HMI Property Management, Inc., one of Mr. Ratchford's companies, acted as property manager for an apartment complex owned by two Oklahoma savings and loan institutions, and that Mr. Ratchford diverted $8,800 of money from this project to his own account, in violation of 18 U.S.C. Sec. 657.

Both violations required specific criminal intent in order to find Mr. Ratchford guilty. Mr. Ratchford testified that he had acted in good faith with no such criminal intent at the time of any of the transactions, and further testified that with respect to counts 1 through 9, had a reasonable expectation of funds sufficient to cover all checks written. Specifically, he testified, that frequent transfers of funds between accounts of the companies were a normal and necessary cash management policy

which had been in effect since the early years of the companies. The evidence also showed, uncontroverted by any other testimony or evidence, that with respect to counts one, two and three the companies had sufficient good funds either already on deposit or in transit, on a combined basis, to cover all checks written. Therefore, he must necessarily have had a reasonable expectation of funds sufficient to cover these checks. He further testified that there was no net overdraft position in the accounts until the second week of April, 1987 after meeting with a commercial loan officer at Mustang National Bank about providing a working capital loan to one of the companies, which loan ultimately fell through and caused the overdraft. Mr. Ratchford's testimony was supported by the bank records and the government's evidence.

With respect to the two misapplication counts, Mr. Ratchford testified, again uncontroverted by any other testimony, that the apartment complex funds were properly deposited into a common property management account for approximately one hundred different properties, including both the property allegedly owned by the savings and loans, and properties owned by Mr. Ratchford, and that the disbursements to Mr. Ratchford were normal distributions to him from moneys he had to his credit in the account.

In her closing arguments, however, the prosecutor made nine misstatements of fact or statements of personal opinion which were direct contradictions of Mr. Ratchford's testimony and the government's own evidence. Furthermore, the prosecutor made a highly prejudicial misstatement of law by saying:

> "Ladies and gentlemen, in order for you to find the defendant not guilty in this case, you're going to have to disbelieve the testimony of three bank officers, two FBI agents, two employees and a vice president of a savings and loan, OK Federal Savings & Loan. I submit to you, ladies and gentlemen, that those individuals were not mistaken about what occurred. They were not mistaken about their recollections and their conversations with the defendant. They have absolutely no reason to come to you during the course of this trial and tell you anything but the truth."
> United States v. Ratchford, 942 F.2d 702 (10th Cir. 1991)

The nine other prejudicial misstatements, each a direct contradiction of Mr. Ratchford's testimony and the evidence, consisted of telling the jury that (a) collateral pledged to secure notes to the banks for the overdrafts were "fake"; (b) Mr. Ratchford went to Mustang National Bank to try to get a loan to cover an existing overdraft; (c) third-party funds being deposited into the accounts were not good funds from third-parties; (d) a

continuous check kiting scheme existed from January or before until April; (e) a complicated and convoluted check kiting scheme was in effect for a four month period; (f) Mr. Ratchford was trained in school to identify a check kite; (g) Mr. Ratchford was trained as an auditor for Pete Marwick [sic] to know what check kiting was; and (h) there is no explanation for the distributions to Mr. Ratchford from the property management account. The prosecutor further stated that transfers from one account to cover checks written on other accounts constitutes a criminal check kite, without any reference to the overall balances of the accounts, the purpose of the transfers, or the intent of the writer.

Mr. Ratchford's trial counsel did not object to any of the misstatements of the prosecutor, nor did the trial judge

provide any contemporaneous correction or admonishment to the jury. The trial judge did instruct the jury that the arguments and statements of counsel are not evidence.

On appeal, the appellate panel held that the statements of the prosecutor did not rise to the level of plain error. They also held that "although it may have been error for the prosecutor to tell the jury members that they had to disbelieve several witnesses before they could acquit defendant, see United States v. Vargas, 583 F.2d 380, 387 (7th Cir. 1978), this comment was not so prejudicial as to require reversal." A petition for rehearing and suggestion for rehearing en banc was denied in both respects.

REVIEW OF THE JUDGMENT OF A STATE COURT

Not applicable.

REVIEW OF THE JUDGMENT OF A FEDERAL COURT

Federal jurisdiction was established in the first instance by the initiation of a federal criminal prosecution under the ambit of 18 United States Code, Sec. 1344 and 657. Appellate review of the judgment of conviction was authorized by Fed.R.App.P 4(b).

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The misstatements of fact and law, and injection of personal opinion by the prosecutor during closing arguments "tipped the scales of justice" in favor of the prosecutor, constituted prosecutorial misconduct and plain error, and deprived Mr. Ratchford of due process of law.

The Opinion of the Tenth Circuit Court of Appeals held that the prosecutor's comments did not rise to the

level of plain error, were within the range of reasonable inferences that could be drawn from the evidence, or were not so prejudicial as to require reversal in view of otherwise sufficient evidence to support the conviction.

The Misstatement, Misconduct and Plain Error Issues

Mr. Ratchford submits that if the Tenth Circuit had followed this court's previous analysis of misstatements and misconduct in Berger v. United States, (1935) 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629, that the Opinion would have held that these comments were so prejudicial as to require reversal.

It is important to note that this was a very complicated case with thousands of transactions occurring with multiple companies and multiple banks over the period in question. It is highly unlikely that any jury member

would be able to review the exhibits consisting of documents or bank account summaries and determine the truth or falsity of statements made during the trial. They must therefore rely on other information for making those judgments.

Mr. Ratchford's trial counsel called no other witnesses to testify about the facts than Mr. Ratchford, whose credibility was paramount to his case. Mr. Ratchford's statements that he acted in good faith and with a reasonable expectation that sufficient funds were available to cover all checks written, together with his other supporting testimony and evidence, were a complete defense to the charges.

By virtue of the prosecutor's assertions of personal knowledge, personal opinion, or misstatements of fact which were directly contradictory to Mr. Ratchford's testimony, members of the

jury must choose to either believe the prosecutor, or believe Mr. Ratchford; they could not believe both.

The Assistant U.S. Attorney, as a representative of the United States of America, goes before the jury with an enormous amount of credibility and legitimacy merely by her position. To place the jury in a position that the jury must chose between the word of the Assistant U.S. Attorney or the word of the defendant, because they cannot both be telling the truth, places the defendant at an almost insurmountable disadvantage when the cornerstone of his defense is his credibility. This was the case here.

The devastating impact of misstatements by the prosecutor, such as those here, should be apparent, especially where a jury faces difficult credibility issues. The courts have long

held that this is highly improper conduct for any attorney, but especially a prosecuting attorney, as set forth below:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935))

Several of the prosecutor's misstatements may seem insubstantial. But when the cornerstone of the defendant's case is the defendant's credibility, every misstatement by the

prosecutor which lends doubt to the defendant's credibility becomes substantial.

Fair play, having the qualities of impartiality, honesty and decency in dealings with another, is the essence of "due process." The Fifth Amendment to the United States Constitution is a shield against unfair and deceptive treatment of an accused by the government. Mr. Ratchford submits that the prosecutor did not play fair in this case.

In the prosecutor's brief to the appeals court, the Assistant U.S. Attorney cites several cases which were not reversed for prosecutorial misstatements. But there were substantial differences from the present case. In each of these cases, the prosecutor's improper statements were (1) limited to a single misstatement not

significant to the outcome of the trial; (2) corrected by the court at the time the statement was made; (3) an "invited response" to improper arguments by defense counsel so as to "right the scales" of justice; or (4) the proof of guilt was so overwhelming that if the prosecutor's misstatements had been halted by the court there was no reasonable probability the outcome of the trial would have been different.

In the present case, the prosecutor's misconduct was not limited to a single misstatement, but rather was flagrant with no less than ten noted false or misleading statements. Defense counsel made no misstatements of fact or law to invite a "correcting" response. Proof of guilt was not overwhelming, for proof of guilt required knowledge of intent which only the defendant held, and

the defendant testified that he acted in good faith.

The judge did not step in and admonish the jury at the time of the conduct, nor was the jury made aware of the nature of the misstatements in the judge's cautionary instruction. Even with the judge's cautionary statement in his instructions, the jury was still left with the decision as to whether to believe the Assistant U.S. Attorney or Mr. Ratchford. They were still in a position that they could not believe both.

For unknown reasons, Mr. Ratchford's trial counsel did not object to the misstatements at trial, therefore requiring that these misstatements be considered under the plain error rule of Rule 52(b) of the Federal Rules of Criminal Procedure. This rule authorizes an appellate court to correct

particularly egregious errors, those which seriously affect the fairness, integrity or public reputation of the judicial proceedings. United States v. Young, 470 U.S. 1, 105 S.Ct. 1038 (1985).

Mr. Ratchford submits that these misstatements and misconduct, when taken as a whole, were particularly egregious errors for the reasons set forth above, "undermined the fundamental fairness of the trial" and "contributed to a miscarriage of justice." Young, 470 U.S. at 1047. Mr. Ratchford further submits that they therefore constitute plain error requiring reversal.

The Substantial Evidence Issue

The Opinion of the appeals court that there existed substantial evidence apart from the misstatements to support the conviction, included two critical

facts which have been misconstrued by the appeals court.

The Opinion was based in part on an an erroneous belief of the appeals court, as set forth in a statement in the Opinion that the "record shows that defendant's account was overdrafted when he applied for the loan..." the first week of April, 1987. United States v. Ratchford, 942 F.2d 702 (10th Cir. 1991). Mr. Ratchford submits that the record does not show that the defendant's accounts were overdrafted during the first week of April, 1987, at the time of loan application. The record regarding overdrafts in April refers only to checks dated from April 21st through April 25th (Tr. Vol. II, pgs. 225-238), which was over two weeks after Mr. Ratchford's loan application the first week of April. The fact that the accounts were not overdrafted at the time of loan

application is consistent with Mr. Ratchford's testimony, and critical to his reasonable belief of sufficient funds and good faith actions. For this substantial fact to have been misconstrued is highly prejudicial to Mr. Ratchford.

The Opinion is also based in part on another erroneous belief of the court that the checks written in January, February and March were not covered by sufficient funds until April 6, the beginning of the second week of April. Mr. Ratchford also submits that the exhibits in the record show that he had sufficient funds in transit to the banks or already on deposit at the banks to timely cover all checks when written, on a combined basis, not just on April 6, 1987 but at all times prior to April 6, including the dates of the checks charged in counts 1-3. Proper understanding of

this fact is equally critical to Mr. Ratchford's case for the same reasons set forth above.

There is no basis in the record for these misconstrued facts other than in the arguments of the prosecutor.

APPENDIX LIST

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. James Allen Ratchford, United States Court of Appeals for the Tenth Circuit, Cause No. 90-6343 (August 12, 1991), rehearing denied September 24, 1991; published under United States v. Ratchford, 942 F.2d 702 (10th Cir. 1991).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None.

(iii) Any order on rehearing:

Rehearing denied September 24, 1991.

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None.

(v) Other appended materials:

Letter to the Supreme Court of the United States dated December 20, 1991, from Alvin Reeves, Jr., CPA.

CONCLUSION

For the foregoing reasons, Mr. Ratchford respectfully requests a Petition for Writ of Certiorari issue to review the Opinion of August 12, 1991, of the United States Court of Appeals for the Tenth Circuit in Cause Number 90-6343.

Respectfully submitted,

JAMES ALLEN RATCHFORD
P.O. BOX 60696
OKLAHOMA CITY, OKLAHOMA
73146
(405) 943-0200

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APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No.
v.	)	
	)	90-6343
JAMES ALLEN RATCHFORD,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CR-90-89-P)

Jay F. McCown, Oklahoma City, Oklahoma, for defendant-appellant.

Vicki Zemp Behenna, Assistant United States Attorney (Timothy D. Leonard, United States Attorney, with her on the brief), Oklahoma City, Oklahoma, for plaintiff-appellee.

Before MCKAY and LOGAN, Circuit Judges, and BRIMMER, Chief District Judge.*

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* The Honorable Clarence A. Brimmer, Chief Judge, United States District Court for the District of Wyoming, sitting by designation.

LOGAN, Circuit Judge.

Defendant James Allen Ratchford was convicted following a jury trial of nine courts of bank fraud and two counts of misapplication of funds, in violation of 18 U.S.C. Sec. 1344(1) and 657. The nine counts of bank fraud were in connection with an alleged check kiting scheme and the two counts of misapplication of funds were for an alleged diversion to personal use of moneys belonging to a savings and loan association. He now appeals, arguing that (1) there was insufficient evidence to support his convictions on the first three bank fraud counts and the two misapplication of funds counts; (2) reversal is required because the prosecutor made prejudicial misstatements in her closing remarks; and (3) the court failed to properly instruct the jury on

defendant's good faith defense on counts four through nine.

I

Defendant first contends that the government presented insufficient evidence to convict him on the first three bank fraud counts of the indictment. Specifically, defendant argues that his bank accounts, when combined, contained sufficient funds on April 6, 1987, to cover the three checks that formed the basis of counts one, two, and three.

"Evidence is considered sufficient to support a criminal conviction if, when viewed in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." United States v. Culpepper, 834 F.2d 879, 881 (10th Cir. 1987) (citing Jackson v. Virginia, 443 U.S. 307 (1979)). Applying this standard to the

instant case, we find sufficient evidence in the record to support defendant's convictions.

Defendant, an accountant and businessman, formed Home Management, Inc. and three related companies in 1980: HMI Property Management, Inc., HMI Realty, Inc., and HMI Construction Company. The indictment charged that in January 1987, defendant began kiting checks at three different banks utilizing the accounts of his companies, his personal account, and an account labeled HMI Investors Trust Account; that defendant's activities continued until April 1987, ultimately causing a loss to two of the banks of nearly $50,000. Count one charged defendant with writing a check in the amount of $4,300 on January 21, 1987, count two a check of $4,500 on February 9, 1987, and count three a check of $4,900 on March 20, 1987, while "knowing

or having reason to know that the funds in [the respective accounts] were not sufficient to pay such . . . check[s]," in violation of 18 U.S.C. Sec. 1344(1). Indictment, I R. tab 5/9/90, at 3, 4.

The government's evidence at trial showed that on the dates the checks charged in counts one through three were written, there were insufficient funds in the respective accounts to cover the checks. The evidence also shows that the covering deposits for these checks were in the form of checks written on either the account to which the original indicted check was deposited or an account of one of defendant's other companies involved in the float scheme. The only argument defendant makes is that the existence of sufficient funds on April 6, 1987, negates a finding of guilt because in a true check kiting scheme, there is never a positive balance of

funds exclusive of inter-account transfers. We disagree. The insufficient fund checks charged in counts one, two, and three were written on January 21, February 9, and March 20, 1987, respectively. For purposes of Sec. 1344(1), the relevant inquiry is whether defendant knowingly had insufficient funds in the accounts being utilized on the date the checks were written. The amount contained in those accounts on April 6 is irrelevant to this determination.

Based on the evidence, we hold that a jury could find beyond a reasonable doubt that defendant "knowingly execute[d] . . . a scheme or artifice to defraud a financial institution." 18 U.S.C. Sec. 1344(1).

II

Defendant's misapplication of funds conviction stemmed from his activities as

head of HMI Property Management, Inc. (HMI Property). HMI Property acted as property manager for Valley Forge, an apartment complex owned by two Oklahoma savings and loan institutions. In the spring of 1987, the apartment complex sustained hail damage which resulted in a cash settlement from the insurance company. Defendant diverted $8,800 of this settlement to his personal account, using the money to pay his charge card debt. HMI Property never repaired the damage to the complex.

Defendant argues that the evidence was insufficient to convict him of misapplication of funds under the language of 18 U.S.C. Sec. 657. Specifically, defendant contends that at the time he procured the funds from the insurance settlement, he was not "connected" with a federally insured institution as required by Sec. 657.

Defendant argues that his only connection was with First Capital Mortgage, the loan servicer for the two savings and loans, and that this contact is too remote for purposes of Sec. 657. We disagree.

Section 657 imposes criminal liability on any "officer, agent or employee of or connected in any capacity with" a savings and loan who embezzles or willfully misapplies any money or funds belonging to such institution. 18 U.S.C. Sec. 657 (emphasis added). In the instant case, defendant's was connected to a savings and loan through his association with First Capital, who employed his company to manage an apartment complex owned by two Oklahoma savings and loans.[1] As president and

---

[1] First Capital, as loan servicer, was responsible for taking in principal

(Footnote Continued)

owner of the managing company, defendant was aware of the savings and loans' ownership of the complex and that his ultimate responsibility was to these owners. It was in this position of trust that he diverted funds he knew belonged to these institutions to his own personal use. The check defendant diverted in part to pay his personal charge card debt was made out to "OK Federal S & L DBA Valley Forge Apts C/O Jim Gladney, Home Mgmt Inc." Addendum Exhibits of Appellee's Brief at 77 (ex. 65). Jim Gladney signed the check for Home Management, Inc. and turned it over to defendant. III R. at 257.

(Footnote Continued)
and interest payments and disbursing them to the mortgage holders of the property. A loan servicer performs this task in the same manner as would a savings and loan. IV R. at 289.

Although each case is fact specific, the courts have given a broad interpretation of Sec. 657 to effectuate congressional intent to protect federally insured lenders from fraud. See United States v. Prater, 805 F.2d 1441, 1446 (11th Cir. 1986). "'In cases where the defendant is not directly employed by the insured bank, courts have focused on the relationship between the employing entity and the bank's business in deciding whether there is a sufficient "connection" for purposes of the statute.'" Id. (quoting United States v. Fulton, 640 F.2d 1104, 1106 (9th Cir. 1981)). See also United States v. Harris, 729 F.2d 441, 445 (7th Cir. 1984) (employees of state agency receiving 60% of operating funds from HUD, working on 100% HUD funded project, are "connected" to HUD sufficiently to support conviction under Sec. 657). Given the facts of the

instant case and the broad interpretation normally afforded Sec. 657, we conclude that defendant was sufficiently connected with an insured savings and loan association to support his convictions for misapplication of funds belonging to it.

III

Defendant next argues that the prosecutor made prejudicial misstatements concerning the law and evidence during her closing argument. In his brief, defendant identifies four false and misleading remarks by the prosecutor that, even though he failed to object, require reversal of his conviction under the plain error rule.

In cases involving a failure to object, Rule 52(b) of the Federal Rules of Criminal Procedure authorizes a court to review the evidence or statement for plain error. The plain error doctrine of

Rule 52(b) "tempers the blow of a rigid application of the contemporaneous-objection requirement." United States v. Young, 470 U.S. 1, 15 (1985). "The Rule authorizes the Courts of Appeals to correct only 'particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" Id. (citations omitted). Rule 52 should be "'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" Id. (quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)).

Defendant points to the following four statements and corresponding evidence in support of his arguments:

First mistatement of the evidence:

> "There are some other facts in this case that are undisputed and that is that the defendant overdrafted his account and he knew the account was overdrafted and he

went to Mustang Bank to get a loan to cover the overdraft situation."

V R. at 599.

Corresponding Evidence:

"Q [by prosecutor]: The money [from the loan] was to cover overdrafts, wasn't it Mr. Ratchford?

A: Not at the time we applied. Not at the time that was had our first meeting and I -- or I thought that the loan had been approved. We issued checks only in the belief that we would have the loan and would have the funds coming in and our issuing checks on that belief is what created the overdraft."

Id. at 526.

Second mistatement of the evidence:

"[Defendant] was trained in school at OSU to identify a check kite. He was trained as an auditor for Pete Marwick [sic] to know what check kiting was."

Id. at 605.

Corresponding Evidence:

"Q [by Prosecutor]: And you know what check kiting is?

A [by Defendant]: I have a general idea.

Q: Were you not taught that in school?

A: Not to my recollection.

Q: Were you not taught that as an auditor at Pete Marwick [sic]?

A: Not specifically.

Q: Was it not one of your jobs to identify kiting procedures in . . . your customers accounts?

A: No, ma'am."

Id. at 519.

Third mistatement of the evidence:

"Does he ever address to you, does he ever explain to you once what that money [from the insurance settlement] was used for, why he felt he was entitled to that money? He doesn't because there is no explanation for it."

Id. at 621.

Corresponding Evidence:

Several times during trial, defendant testified that he was entitled to the money pursuant to his property ownership. IV R. 352, 447, 459, 460; V R. 574-75.

Mistatement of the law:

"Ladies and gentlemen, in order for you to find the defendant not guilty in this case, you're going to have to disbelieve the testimony of three bank officers, two FBI agents, two employees and a vice president of a

> savings and loan, OK Federal Savings & Loan. I submit to you, ladies and gentlemen, that those individuals were not mistaken about what occurred. They were not mistaken about their recollections and their conversations with the defendant. They have absolutely no reason to come to you during the course of this trial and tell you anything but the truth."
>
> V R. at 606-07.

Corresponding Law:

> "[E]ven assuming the testimony of the Prosecution and Defense witnesses contained unavoidable contradiction, it of course does not follow as a matter of law that in order to acquit [the defendant] the jury had to believe the agents had lied. . . . [T]o tell the jurors that they had to choose between the two stories was error."
> United States v. Vargas, 583 F.2d 380, 387 (7th Cir. 1978).

We are satisfied that these statements of the prosecutor did not rise to the level of plain error. The prosecutor's comments on defendant's loan application and knowledge of check kiting were within the range of reasonable inferences that could be drawn from the

evidence. See United States v. Manriquez Arbizo, 833 F.2d 244, 247 (10th Cir. 1987). The record shows that defendant's account was overdrafted when he applied for the loan and that accountants of similar background and training were instructed on the nuances of check kiting. We also see nothing misleading about the prosecutor's statements on defendant's use of the insurance settlement. Finally, although it may have been error for the prosecutor to tell the jury members that they had to disbelieve several witnesses before they could acquit defendant, see United States v. Vargas, 583 F.2d 380, 387 (7th Cir. 1978), this comment was not so prejudicial as to require reversal. The record contains substantial evidence apart from this remark to support defendant's convictions. Furthermore, the trial judge instructed the jury that

the arguments and statements of counsel are not evidence, that they could reject even uncontradicted testimony, and that they are the sole judges of the facts.

IV

Finally, defendant argues that the district court did not properly instructed the jury on his good faith defense to the bank fraud charges. He contends that the court should have included in its instruction the following statement: "Defendant's belief that he was acting in good faith need not be rational nor reasonable if Defendant's beliefs were truly held." Appellant's Brief at 12.[2]

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[2] The district court instructed the jury as follows:

> "The defendant states that he acted in good faith and that he did not intend to defraud any of the

(Footnote Continued)

A defendant is entitled to an instruction on a theory of defense if it is legally sound and supported by the evidence presented at trial. A trial

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(Footnote Continued)
financial institutions in question, or anyone else. Good faith is a complete defense to the charges in the indictment, since good faith on the part of the defendant is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the defendant to prove his good faith, of course, since he has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted with the specific intent to defraud as charged in the indictment.

A defendant who acts upon an opinion honestly held by him at the time of the alleged acts, or pursuant to a belief honestly entertained by him at the time of the alleged acts, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken or wrong. Similarly, evidence which establishes only that a person made a mistake in judgment or an error in

(Footnote Continued)

judge, however, "is given substantial latitude and discretion in tailoring and formulating the instructions so long as they are correct statements of law and

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(Footnote Continued)

management or was careless, does not establish fraudulent intent. In order to establish fraudulent intent on the part of a person, it must be established that the person knowingly and intentionally intended to deceive another.

On the other hand, the defendant's good faith must have existed at the time the alleged unlawful acts were committed. One cannot assert good faith as a defense if the opinions or beliefs advanced as justifications for the good faith defense were formulated after the commission of criminal acts.

Good faith does not mean a hope that money obtained pursuant to a scheme to defraud will eventually be put back.

It is for you the jury to determine whether the defendant truly held the beliefs or opinions in question at the time of the alleged acts. Moreover, it will be

(Footnote Continued)

fairly and adequately cover the issues presented." United States v. Pack, 773 F.2d 261, 267 (10th Cir. 1985) (citation omitted). Applying this standard to the instant case, we are satisfied that the district court did not err in instructing the jury on defendant's good faith defense. Under the court's instruction, the jury was informed that a defendant acting upon an honest opinion or belief is not chargeable with fraudulent intent even if his opinion is erroneous or his belief is mistaken or wrong. This instruction is an adequate statement of

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(Footnote Continued)

> for you, the jury, to determine, from all of the facts and circumstances appearing before you, if the government has established, beyond a reasonable doubt, that the defendant had the requisite state of mind in connection with the alleged offenses."

I R. tab 59, inst. 20-A.

the law, see United States v. Cronic, 839 F.2d 1401, 1403 (10th Cir. 1988); United States v. Hopkins, 744 F.2d 716, 717-18 (10th Cir. 1984), and sufficiently broad to include even beliefs not rationally or reasonably held.

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No.
v.	)	
	)	90-6343
JAMES ALLEN RATCHFORD,	)	
	)	
Defendant-Appellant.	)	

ORDER
Filed September 24, 1991

Before MCKAY, LOGAN, Circuit Judges, and BRIMMER,* District Judge

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* The Honorable Clarence A. Brimmer, District Judge, United States District Court for the District of Wyoming, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules for Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing is denied.

The motion of Jay F. McCown to withdraw as counsel for appellant is denied.

Entered for the Court

Patrick Fisher
Chief Deputy Clerk

ALVIN REEVES, JR., C.P.A.

2905 ELIZABETH ANN TERRACE MOORE, OK 73160 405-794-5593

December 20, 1991

Supreme Court of the United States
1 First Street Northeast
Washington, D.C. 20543

RE: United States v. Ratchford,
942 F.2d 702 (10th Cir. 1991)

Honorable Gentlemen:

I am a Certified Public Accountant licensed in the State of Oklahoma, with over 20 years experience in securities, corporate finance and business management. I currently serve as Chairman of the Members in Industry Committee for the Oklahoma Society of CPA's, and as a member of the Executive Committee for Members in Industry for the AICPA.

I have reviewed the above referenced Opinion of the United States Court of Appeals for the Tenth Circuit, and have reviewed in detail the bank accounts of

Mr. Ratchford and his companies during the pertinent period from January through April, 1987. My review of the bank accounts included review of bank statements, checks, deposit slips and other documents, and summaries prepared therefrom.

In my opinion, the Opinion of the United States Court of Appeals for the Tenth Circuit includes two significant errors or misconstruing of fact, to wit:

(1) The Opinion states "...his bank accounts, when combined, contained sufficient funds on April 6, 1987, to cover the three checks that formed the basis of counts one, two, and three."

In my opinion, based upon my review, the bank accounts, when combined, contained sufficient funds <u>at all times prior</u> to April 6, 1987

to cover the three checks that formed the basis of counts one, two and three. Furthermore, the checks that formed the basis of counts one, two and three were covered by deposits of good funds, or transfers from accounts with good funds in a timely manner in accordance with normal and acceptable business practices.

(2) The Opinion also states "The record shows that defendant's account was overdrafted when he applied for the loan..."

The transcript record states that Mr. Ratchford applied for the loan the first week of April, 1987, which would have been prior to April 6, 1987. Based upon my review of the bank accounts, it is my opinion

that Mr. Ratchford's accounts, on a combined basis, were not overdrafted prior to April 6, 1987, and therefore, would not have been overdrafted at the time of his loan application.

Please feel free to contact me should you need any additional information, or if I could otherwise be of service to you.

Sincerely,

(original signed)

Al Reeves, Jr., CPA

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